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Corporal Punishment in the United Kingdom and the United States: Violation of Human Rights or Legitimate State Action?

By Wallace J. Mlyniec*†

I. INTRODUCTION

Corporal punishment has been part of the literary, religious, and political fabric of Anglo-American society since its earliest organization.¹ Children and adults who behaved contrary to the wishes of their superiors, as well as those who violated the law, often suffered physical pain for their transgressions. Although laws developed which prohibited the severe beating of wards, servants, and other persons of inferior status, the state reserved to itself the power to torture, maim, and kill to preserve the peace.

Early common law recognized the right of individuals to be protected from assault and battery.² Nonetheless, the common law allowed teachers to inflict moderate correction upon children when necessary to fulfill the goals of education.³ This authority was once thought to be delegated to the teacher by virtue of the *in loco parentis* doctrine.⁴ The more modern view, however, is that compulsory education laws give the state the right to inflict corporal punishment in conjunction with its duty to inform and mold the character of students.⁵

A "proper caning" has long had an accepted, if feared, place in the education

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1. See generally Williams, *Social Sanctions for Violence Against Children: Historical Perspectives*, reprinted in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* 25 (I. Hyman & J. Wise eds. 1979); H. FALK, *CORPORAL PUNISHMENT* (2d ed. 1972).

2. 3 W. BLACKSTONE, *COMMENTARIES* *120, 121; 4 W. BLACKSTONE, *COMMENTARIES* *216-17; W. PROSSER, *THE LAW OF TORTS* 28 (4th ed. 1971).

3. 1 W. BLACKSTONE, *COMMENTARIES* *453; 3 W. BLACKSTONE, *COMMENTARIES* *120.

4. *In loco parentis* means: "[i]n the place of the parent; instead of the parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

5. See *Ingraham v. Wright*, 430 U.S. 651, 662 (1977), (citing I. HARPER & F. JAMES, *LAW OF TORTS* § 3.20 (1956)). See also R. PAQUET, *JUDICIAL RULINGS, STATE STATUTES AND STATE ADMINISTRATIVE REGULATIONS DEALING WITH THE USE OF CORPORAL PUNISHMENT IN PUBLIC SCHOOLS* 21-24 (1982). Compare Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis*, 117 U. PA. L. REV. 373, 379 (1969) with *Smith v. West Virginia Board of Education*, 295 S.E.2d 680, 685 (W. Va. 1982) and cases cited therein.

of children in the United Kingdom. Early British society, highly structured along class lines, recognized teachers as members of a distinct profession. This position within the social hierarchy, combined with a school system that traditionally exercised independence, created an atmosphere in which non-interference by parents in matters of school discipline prevailed.⁶ Even so, as early as the seventeenth century, Children's Petitions against the severity of school discipline were presented to the British Parliament.⁷ Despite these early attempts to protect children, the practice of harsh physical discipline continued virtually unabated until quite recently.⁸

Although early American attitudes toward corporal punishment in school were similar to those of the British, they did not develop identically. The settlers of the Massachusetts Bay Colony brought the practice from England to America. Once in America, however, the settlers superimposed their own strict Puritan beliefs regarding man's depravity onto the more traditional British rationale.⁹ The Puritans considered children to be especially prone to sin and in need of stern discipline. Accordingly, they developed rules to reflect these beliefs.¹⁰ For example, the rules regulating the Freetown School in Dorchester, Massachusetts in 1645 invoked an "ordinance of God" to authorize teachers to dispense corporal punishment.¹¹ These rules severely circumscribed a parent's ability to interfere with the teacher's right to discipline unruly children.¹² The attitudes embodied in the Freetown rules were so widespread that even the Quakers, who although more inclined to stress love rather than fear, also sanctioned the use of corporal punishment in their schools.¹³

6. Raichle, *The Abolition of Corporal Punishment in New Jersey Schools*, 2 HISTORY OF CHILDHOOD QUARTERLY: THE JOURNAL OF PSYCHOHISTORY 53, reprinted in HYMAN & WISE, *supra* note 1, at 62, 66.

7. See Freeman, *The Children's Petition of 1669 and its Sequel*, 14 BRIT. J. EDUC. STUD. 216, reprinted in Hyman & Wise, *supra* note 1, at 41. The Children's Petition of 1669 was entitled, "The Children's Petition: or a modest remonstrance of the intolerable grievances our youth lie under, in the accustomed severities of school discipline of this nation. Humbly presented to the consideration of the Parliament. . . ." The Children's Petition was apparently circulated among the members of Parliament, but was never formally introduced as legislation. *Id.* Neither the Commons' nor the Lords' Journals make any reference to the matter, however, and the House of Lords Papers calendared by the Royal Commission on Historical Manuscripts are equally silent. Another Children's Petition was introduced in 1868, but never received a second reading. *Id.*

8. See Note, *Corporal Punishment in Public Schools: A Violation of Substantive Due Process?*, 33 HASTINGS L.J. 1245, 1254-55 (1982) [hereinafter cited as Note, *Corporal Punishment in Public Schools*]. Of course, criminal and civil penalties for abuse of authority were always possible. Nonetheless, the doctrine of reasonableness often resulted in virtual immunity for the beater. *Id.*

9. FALK, *supra* note 1, at 16-19, 34-42.

10. *Id.* at 18-20, 42-45.

11. See Piehl, *Neither Corporal Punishment Cruel nor Due Process Due: The United States Supreme Court's Decision in Ingraham v. Wright*, reprinted in Hyman & Wise, *supra* note 1, at 91, 95.

12. See *id.* at 104 n.17.

13. See *id.* at 95-96. The Quakers banned corporal punishment for crime, however, in the colony of West Jersey in 1681, and in Pennsylvania in 1682. FALK, *supra* note 1, at 23.

Physical chastisement was part of many facets of British and Colonial American society. The law permitted husbands to whip their wives,¹⁴ masters to whip their servants,¹⁵ and officers to whip seamen.¹⁶ Criminals were treated especially harshly. Amputation of body parts, flogging, enslavement, and execution, all common punishments in medieval times, continued throughout the eighteenth and nineteenth centuries.¹⁷ It was not until the penal and criminal code reforms of the mid-nineteenth century that maiming, branding, flogging, and execution began to give way to imprisonment as the primary mode of sentencing.¹⁸

Even after these reforms, prison officials were still permitted to impose harsh physical punishment to maintain discipline within their institutions. In nineteenth century Virginia, for example, prison officials were permitted to punish by stripes, iron mask, gag, or dungeon.¹⁹ Such disciplinary actions within prisons remained common in both the United Kingdom and the United States until the mid-twentieth century.

Change in the schools came even more slowly than change in the penal and correctional systems. In the nineteenth century, leading educators such as Horace Mann began to criticize the practice of corporal punishment.²⁰ New Jersey abolished corporal punishment by statute in 1867, although there is evidence that it did not truly disappear.²¹ In both the United Kingdom and the United States, societies were formed with the goal of eliminating or curtailing corporal punishment in the schools; but to this date, their success has been varied.²² As of this writing, the use of corporal punishment in schools has not

14. RESTATEMENT OF TORTS § 895F (1965).

15. 3 W. BLACKSTONE, COMMENTARIES *120; FALK, *supra* note 1, at 15.

16. I. HARPER & F. JAMES, LAW OF TORTS § 3.20 (1956); FALK, *supra* note 1, at 33.

17. See generally A. CAMPBELL, LAW OF SENTENCING 1-12 (1978).

18. See generally F. WINES, PUNISHMENT AND REFORMATION (W. Lane ed. 1983); M. FOUCAULT, DISCIPLINE AND PUNISHMENT (A. Sheridan trans. 1977). The judicial penalty of whipping, virtually abolished in Britain in 1861, was totally eliminated there with the passage of the Criminal Justice Act of 1948, 1948, 11 & 12 Geo. 6, ch. 58. REPORT OF THE ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS 2-3 (Home Office 1960).

19. See *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). Corporal punishment was used for serious disciplinary infractions in British prisons until the passage of the Criminal Justice Act of 1967, 1967, ch. 80. M. FITZGERALD, BRITISH PRISONS 74 (1979).

20. FALK, *supra* note 1, at 72-107. See also H. MANN, THE CRISIS IN EDUCATION 148-52 (Filler ed. 1965); H. SMITH, THE BIBLE, THE ROD AND RELIGION IN COMMON SCHOOLS — Letters from M. Smith to H. Mann 32-33, 38-42 (1846).

21. See Raichle, *supra* note 6, at 66. George B. Sears, superintendent of the Newark schools, and his successor, William N. Barringer, condoned corporal punishment. In 1876, for example, over 9,400 whippings were recorded in the Newark schools. Raichle, *supra* note 6, at 74. In fact, shortly after the ban was enacted, it was nullified for those New Jersey towns empowered by the state legislature to make their own local regulations for the governance of schools. *Id.* at 78. The current law prohibiting corporal punishment in New Jersey is N.J. STAT. ANN. § 18A:6-1 (West 1968).

22. The New Jersey Society of Teachers passed a resolution opposing corporal punishment in 1845. See Raichle, *supra* note 6, at 73. Two organizations, the Society of Teachers Opposed to Physical Punishment (STOPP) (in the United Kingdom), and the Committee to End Violence Against the Next Generation (in the United States), currently lead the efforts to abolish corporal punishment in their

been prohibited entirely by the British Parliament,²³ and the majority of states in the United States still permit its use.²⁴

While philosophical opinion regarding the effectiveness of corporal punishment is divided,²⁵ its use in schools is far from uncommon. A survey of state school disciplinary practices conducted in 1980 by the U.S. Department of Education estimated that corporal punishment was administered over 1,400,000 times in the United States during the 1979-80 school year.²⁶ A British report prepared by the Society of Teachers Opposed to Physical Punishment (STOPP) estimates that over 230,000 beatings occur in England and Wales each year.²⁷ This widespread use of corporal punishment in schools appears likely to continue, at least in the United States. A recent task force appointed by President Reagan to study violence in schools, for example, has called for a restoration of traditional disciplinary practices in the classroom.²⁸

There is no reason to catalogue anew the severity of the beatings or the offenses for which they are imposed.²⁹ Both run the gamut from the trivial to the

respective countries. The American Psychological Association and the National Education Association also have campaigned for a ban on corporal punishment.

23. See *infra* notes 98-100 and accompanying text.

24. Massachusetts has joined New Jersey in banning corporal punishment entirely by statute. MASS. GEN. LAWS ANN. ch. 71, § 37G (West 1976 Supp.). Hawaii has done so by administrative regulation. HAWAII EDUC. ADMIN. Order of Mar. 1, 1976, *cited in* PAQUET, *supra* note 5, at 74. The District of Columbia also has banned corporal punishment by administrative regulation. D.C. Bd. OF EDUC. RULES, ch. 4, § 423-3. Some cities and school districts have done so as well. Ten states are silent on the issue, two seem contradictory, and thirty-six permit it. PAQUET, *supra* note 5, at 52. See also Friedman & Hyman, *Corporal Punishment in the Schools: A Descriptive Survey of State Regulations*, in Hyman & Wise, *supra* note 1, at 157; NAT'L INST. OF EDUC. PROCEEDINGS: CONFERENCE ON CORPORAL PUNISHMENT IN THE SCHOOLS (1977).

25. See generally Hyman & Wise, *supra* note 1, at 299-405; NAT'L EDUC. ASS'N, REPORT OF THE TASK FORCE ON CORPORAL PUNISHMENT (1972).

26. U. S. DEP'T OF EDUC. 1980 ELEMENTARY AND SECONDARY SCHOOLS CIVIL RIGHTS SURVEY 3 (1982). While the Department of Education considers its data to be as accurate as possible, it acknowledges that school districts often submitted incomplete, inconsistent, and inaccurate data. *Id.* at 1. Figures from the 1982 survey, which are less reliable since they do not include reports from Vermont, New Hampshire, or New York City, indicate that 1,027,394 instances of corporal punishment occurred in 1982. U. S. DEP'T OF EDUC., 1982 ELEMENTARY AND SECONDARY SCHOOLS CIVIL RIGHTS SURVEY (1984).

27. ONCE EVERY NINETEEN SECONDS, SOC'Y OF TEACHERS OPPOSED TO PHYSICAL PUNISHMENT (1983); Hodges, *One School Child Beaten Every 19 Seconds, Survey Says*, THE TIMES (LONDON), Aug. 3, 1983, at 4, cols. 4-5.

28. See WORKING GROUP ON SCHOOL VIOLENCE/DISCIPLINE, DISORDER IN THE PUBLIC SCHOOLS: MEMORANDUM TO THE CABINET COUNCIL ON HUMAN RESOURCES 22, 23 (Jan. 3, 1984). The document does not, however, specifically call for more use of corporal punishment to control discipline.

29. Detailed descriptions regarding the use of corporal punishment in schools have been presented by a number of authorities. See, e.g., Hyman & Wise, *supra* note 1; Garvey, *Child, Parent, State and the Due Process Claim: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 779-83 (1978); Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Punishment*, 52 S. CAL. L. REV. 1305 (1979); Clark, *Ingraham v. Wright and the Decline of Due Process*, 12 SUFFOLK U.L. REV. 1151 (1978); Note, *Corporal Punishment, For School Children Only*, 27 DRAKE L. REV. 137 (1978); Note, *Corporal Punishment in Public Schools*, *supra* note 8; Zillick, *BEATING IS BETTER*, 1982 PUB. LAW 4; MacEwan, *Corporal Punishment: The European Court's Ruling*, 26 J. L. SOC'Y. SCOTLAND 235 (1981); Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978).

serious. These incidents have given rise to lawsuits which have reached the highest courts in both the United States and the United Kingdom. In the United States, cases have been resolved by the Supreme Court, federal appellate courts, and many state supreme courts. In the United Kingdom, cases have been litigated beyond the national courts, ultimately reaching international tribunals. The arguments in favor of corporal punishment presented by the governmental authorities in both nations have resembled each other, as have the arguments of those who opposed it. The results in each country have been similar with regard to corporal punishment in the penal system, but dramatically different with regard to corporal punishment in the educational system.

The purpose of this article is not to reargue those positions. They have been argued in any number of law review articles³⁰ and legal briefs. Rather, it is to select the most important of those recent cases, to compare the effectiveness of the arguments set forth therein, and finally, to suggest possible legal and societal outgrowths of those judicial opinions.

Since some of the decisions have been rendered by the European Court for Human Rights (the European Court), a brief discussion of the structure and purpose of that court is provided in the next section. The following section discusses the development and current state of the law of corporal punishment in the penal systems of both the United States and the United Kingdom. The article then presents a similar analysis of the law of corporal punishment in the school systems of each nation. Finally, the author concludes with some thoughts about the impact of the recent decisions of the European Court upon the continued practice of corporal punishment in the United States.

II. THE EUROPEAN COURT FOR HUMAN RIGHTS

In the United Kingdom, the major cases involving issues of corporal punishment have been ultimately resolved beyond the borders of that nation in the European Court. It is important to discuss the nature of this international tribunal in order to understand the effect of its judgments on the sovereign nations subject to its jurisdiction.

The European Court is virtually without parallel in the world.³¹ It was created

30. See *supra* note 29.

31. Only the Inter-American Commission and Inter-American Court for Human Rights, created by the American Convention on Human Rights of 1969, are similar to the European Commission and Court. See American Convention on Human Rights, signed Nov. 22, 1969, OEA/Ser. K/XVI/I.1, Doc.65, Rev. 1, Corr. 1 (1970) [hereinafter cited as American Convention], reprinted in INTER-AMERICAN COMMISSION ON HUMAN RIGHTS [IACHR], Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser. L/V/II.50, Doc. 6, at 27 (1980). The American Convention was based in large measure upon the European Human Rights Convention. R. BEDDARD, HUMAN RIGHTS AND EUROPE 36 (1980). The United States has signed but not ratified this treaty. Some U.N. bodies permit individual petitions to be filed against the member nations. See generally Stein and Vining, *Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Constitution*, reprinted in EUROPEAN LAW AND THE INDIVIDUAL 113 (Jacobs ed. 1976).

as part of the Council of Europe³² in 1950,³³ under the European Convention on Human Rights,³⁴ and become operative in 1953.³⁵ The Convention was the product of a war-weary Europe whose member nations sought a means to avoid the demise of democracy and the subsequent carnage that the demise might spawn.³⁶ The Convention was also stimulated by a post-war desire to encourage the political and economic union of Europe.³⁷

The European Court is one of three bodies³⁸ empowered by the Convention to investigate cases of alleged violations of specific human rights. It is composed of a number of judges equal to the number of nations sharing membership in the Council of Europe.³⁹ Judges are elected by the Consultative Assembly of the Council of Europe⁴⁰ and serve for a period of nine years.⁴¹ Each case is heard by a panel of seven judges.⁴² Decisions are reached by simple majority.⁴³

Because the European Court is an international tribunal, its power over a nation exists only by a partial relinquishment of national sovereignty. Pursuant to the Convention, a signatory to the treaty can declare that it recognizes the compulsory jurisdiction of the European Court over its actions as they relate to the Convention.⁴⁴ Absent such declaration, the European Court has no jurisdic-

32. The Council of Europe was created on May 5, 1949. Its purpose was to achieve greater European unity between members, to facilitate economic and social programs, and to uphold the principals of parliamentary democracy.

33. The antecedents of the Convention predate even the Council of Europe. As early as 1948, European diplomats were seeking ways to unite Europe and to guarantee human rights. A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 5-6 (1977).

34. Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter cited as Convention]. Five additional protocols came into force between 1952 and 1971. The Convention and its protocols are reprinted in COUNCIL OF EUROPE, *EUROPEAN CONVENTION ON HUMAN RIGHTS, COLLECTED TEXTS*, ch. 1 (1971). Some Council of Europe nations have failed to ratify all of the protocols.

35. The first election for members of the European Court of Human Rights took place on Sept. 3, 1958, in accordance with Article 56. Z. NEDJATI, *HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION* 8 (1978). Only two nations, Denmark and Iceland, accepted compulsory jurisdiction at the signing of the Convention. Eight acceptances were required before compulsory jurisdiction was implemented. ROBERTSON, *supra* note 34, at 195.

36. NEDJATI, *supra* note 35, at 4.

37. BEDDARD, *supra* note 31, at 17.

38. The other two bodies are the European Commission on Human Rights and the Committee of Ministers. The Commission on Human Rights is composed of representatives of each nation signatory to the Convention. The Committee of Ministers is the executive organ of the Council of Europe and is made up of the foreign ministers of each of the nations.

39. Convention, *supra* note 32, art. 38. There are currently 21 nations in the Council of Europe, including Austria, Belgium, Cyprus, Denmark, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxemburg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and West Germany.

40. Convention, *supra* note 32, art. 39.

41. *Id.* art. 40.

42. *Id.* art. 43.

43. *Id.* art. 52. See also NEDJATI, *supra* note 35, at 9. Cases resolved by the Committee of Ministers require a two-thirds majority. BEDDARD, *supra* note 31, at 43.

44. Convention, *supra* note 32, art. 46. This article was the result of a compromise. ROBERTSON, *supra*

tion. Jurisdiction is further contingent upon the case being referred to the European Court by the European Commission on Human Rights,⁴⁵ which also was created as part of the Convention, or by a nation that is party to the controversy.⁴⁶ To this extent, the European Court's jurisdiction does not significantly differ from that of any other international tribunal. What makes it unique is its subject matter — human rights,⁴⁷ and the extent to which an individual citizen can invoke the European Court's authority to bring an action against his own nation.⁴⁸

A basic principle of international law is that a state has the exclusive and unfettered right to exercise its jurisdiction within its own territory over its own citizens.⁴⁹ While inroads upon this principle can be found in international documents drafted as early as 1648,⁵⁰ the overwhelming majority of current and historical international agreements create no machinery to implement international control over national events. Moreover nations do not generally recognize international guarantees to private citizens as more than normative or hortatory.⁵¹

The European Convention on Human Rights added new dimensions to international tribunals. First, the treaty can be violated by a nation's treatment of its own citizens.⁵² Second, an aggrieved individual can petition for redress of viola-

note 34, at 195. Eighteen of the twenty-one member nations of the Council of Europe have submitted to compulsory jurisdiction, although not all of them have done so for indefinite periods. *See supra* note 39. Turkey, Liechtenstein, and Malta have not done so at all. 1982 Y.B. EUR. CONV. ON HUMAN RIGHTS 34.

45. Convention, *supra* note 32, art. 48. *See also supra* note 38. In some cases, applications are forwarded not to the court but to the Committee of Ministers by the Commission. *See* Convention, *supra* note 32, art. 32. For a complete description of the work of the Committee of Ministers, *see* ROBERTSON, *supra* note 34, at 237-67.

46. Convention, *supra* note 32, art. 48.

47. The only other international court taking jurisdiction over human rights violations is the Inter-American Court for Human Rights. For a general discussion of the treaty establishing the Inter-American Court, *see* Buergenthal, *The American Convention of Human Rights*, 21 BUFFALO L. REV. 121 (1971); *Symposium: The American Convention on Human Rights*, 30 AM. U.L. REV. 1 (1981). The United States has signed but not ratified this treaty. *Id.*

48. The Convention also permits a party nation to present a petition to the European Court against another party nation alleging a violation of the treaty. In the early years of the European Court's existence, most claims involved only nations. In recent times, the number of individual claims has increased. BEDDARD, *supra* note 31, at 4-6.

49. *See, e.g.,* Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, reprinted in THE EUROPEAN CONVENTION ON HUMAN RIGHTS, A REPORT OF A LECTURE AND CONFERENCE HELD ON NOV. 23 AND 24, 1965 at 2 [hereinafter cited as EUROPEAN CONVENTION REPORT]; L. OPPENHEIMER, INTERNATIONAL LAW 20, 37 (H. Lauterpacht ed. 1955).

50. The Treaty of Westphalia, for example, attempted to guarantee religious freedom and amnesty after the Thirty Years War. Treaty of Peace Between the Empire and Sweden § IV(50), § V(28); 1 PARRY'S T.S. 198-270.

51. The U.N. Universal Declaration of Human Rights, approved Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810, at 56 (1948), is one example. The U.N. International Covenant on Civil and Political Rights, entered into force Mar. 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), is another example.

52. Convention, *supra* note 32, arts. 1, 25.

tions of rights secured by the Convention, even when such violations are perpetrated by the individual's own nation.⁵³

The right of an individual to petition is not absolute. Only those citizens whose nations have filed formal declarations recognizing the right to individual application, thereby partially waiving sovereignty, may petition.⁵⁴ Applications for redress cannot go directly to the European Court; rather, they must first be considered by the Commission on Human Rights (the Commission), which assesses the facts of each controversy and seeks a friendly resolution.⁵⁵ Applications are not accepted by the Commission unless the petitioner has exhausted all domestic remedies⁵⁶ and has applied to the Commission within six months of the final domestic decree.⁵⁷ Petitions cannot be anonymous,⁵⁸ nor substantially the same as matters already considered by the Commission, nor submitted to another international investigatory commission.⁵⁹ Finally, any application considered incompatible with the Convention,⁶⁰ ill-founded,⁶¹ or an abuse of the right to petition,⁶² is rejected.

All applications must be based on a violation of a right guaranteed by the Convention. Articles Two through Fourteen of the Convention as well as articles in several additional Protocols set forth the specific rights that are guaranteed. They include the right to life,⁶³ liberty,⁶⁴ security of persons,⁶⁵ fair public trial,⁶⁶ and freedom of movement⁶⁷ and residence.⁶⁸ They include a prohibition against expulsion,⁶⁹ torture,⁷⁰ inhuman or degrading punishment,⁷¹ slavery,⁷² servitude,⁷³ and discrimination.⁷⁴ Finally, privacy,⁷⁵ family integrity,⁷⁶ and intellec-

53. *Id.* art. 25.

54. *Id.* Sixteen of the twenty-one Council of Europe nations have now declared their intentions to abide by Article 25, although only a few nations have done so for indefinite periods. *See supra* note 39. Cyprus, Greece, Liechtenstein, Malta, and Turkey have not recognized the right of individual petition. 1982 Y.B. EUR. CONV. ON HUMAN RIGHTS, at 32.

55. Convention, *supra* note 32 arts. 28-32.

56. *Id.* art. 26.

57. *Id.*

58. *Id.* art. 27(1)(a).

59. *Id.* art. 27(1)(b).

60. *Id.* art. 27(2).

61. *Id.*

62. *Id.*

63. *Id.* art. 2.

64. *Id.* art. 5.

65. *Id.*

66. *Id.* arts. 5-7.

67. *Id.* art. 2, protocol 4.

68. *Id.*

69. *Id.* art. 3, protocol 4.

70. *Id.* art. 3.

71. *Id.*

72. *Id.* art. 4.

73. *Id.*

74. *Id.* art. 14.

75. *Id.* art. 8, 12.

76. *Id.*

tual⁷⁷ and political activity⁷⁸ are protected. Applications to secure the protection of rights not specifically guaranteed by the convention have routinely been denied.⁷⁹

Applications are delivered to the Secretary General of the Council of Europe and sent to the Commission on Human Rights.⁸⁰ The Commission has four tasks. It must rule on admissibility,⁸¹ establish facts,⁸² attempt to secure friendly settlements,⁸³ and report conclusions in the form of an opinion.⁸⁴ It does not have the power to make decisions regarding violations.⁸⁵ Only the European Court or the Committee of Ministers has that power. Decisions by the Commission which are adverse to an individual or in some way unsatisfactory cannot automatically be taken to the European Court. Only the nations party to the Convention, or the Commission itself, may submit a case.⁸⁶ Consequently, an individual application rejected by the Commission as inadmissible has almost no chance of being referred to the European Court for resolution.

When a matter is referred, the European Court examines it with reference to reports from the Commission. It has the power to call witnesses, hear arguments, request further submissions, and make on-site visits.⁸⁷ The applicant's personal standing in the European Court, once the case is submitted, is uncertain. The Commission does not act as the individual's advocate,⁸⁸ nor does the Convention specifically give the individual the right to appear. Nonetheless, in submitting its report to the European Court, the Commission may make use of the applicant's views in stating relevant arguments,⁸⁹ and the individual may be represented by counsel if the party nation does not object.⁹⁰ At the conclusion of its investigation, the European Court rules on whether a provision of the Convention has been contravened.

77. *Id.* arts. 9-11; art. 2, protocol 1.

78. *Id.*

79. NEDJATI, *supra* note 35, at 24.

80. Convention, *supra* note 32, art. 25.

81. *Id.* arts. 25-27. See also ROBERTSON, *supra* note 34, at 158. Admissibility refers to compliance with prerequisites for filing a petition. For a more complete discussion, see BEDDARD, *supra* note 31, at 38.

82. Convention, *supra* note 32, art. 28(a).

83. *Id.* art. 28(b).

84. *Id.* art. 31(1).

85. Although only the European Court has the power to decide that a violation has not occurred, a rejection of an application by the Commission implicitly suggests such a result and effectively ends the inquiry.

86. Convention, *supra* note 32, art. 44. The Commission may refer cases to either the Court or to the Committee of Ministers. There are no guidelines to determine when applications will be sent to the Court or to the Committee. For a more complete discussion, see BEDDARD, *supra* note 31, at 42-46.

87. BEDDARD, *supra* note 31, at 47-49.

88. ROBERTSON, *supra* note 34, at 214.

89. *Lawless v. Ireland*, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 444; see also BEDDARD, *supra* note 31, at 132-36.

90. See *DeWilde v. Belgium*, 1967 Y.B. EUR. CONV. ON HUMAN RIGHTS 420, 1971 Y.B. EUR. CONV. ON HUMAN RIGHTS 788. See also ROBERTSON, *supra* note 34, at 219-21.

The party nations have agreed to abide by decisions of the European Court.⁹¹ The Committee of Ministers supervises execution of judgments.⁹² If the judgment merely requires just satisfaction,⁹³ implementation generally poses few problems. If it calls into question national law or policy, or contravenes a decision of a national court, complex questions of law arise. The European Court is not a supreme appellate tribunal for those nations party to the Convention. Nor are specific remedies against non-complying violators set forth in the Convention. Thus, the violating nation must create the remedy. Should the nation refuse to rectify violations, the individual has no further recourse.⁹⁴ Questions regarding remedies involve complex issues of domestic and international law that are well beyond the scope of this article.⁹⁵ In the United Kingdom, the Convention has not been incorporated into English law by legislation, but nevertheless has had a significant influence on British legal matters.⁹⁶ Suffice it to say that the Convention appears to be working relatively satisfactorily,⁹⁷ and has worked with reasonable though not complete effectiveness in protecting the rights guaranteed by the Convention.

III. CORPORAL PUNISHMENT IN THE PENAL SYSTEM

A. *United Kingdom*

Although Parliament, in 1948, abolished corporal punishment as an adult sentence and in 1967 eliminated its use as a disciplinary sanction in prison,⁹⁸ statutes permitting the use of physical punishment continued to remain in existence in certain regions of the United Kingdom.⁹⁹ On the Isle of Man, for

91. Convention, *supra* note 32, art. 53.

92. *Id.* art. 54.

93. *Id.* art. 50.

94. Of course, public or diplomatic pressure would undoubtedly be intense should a nation refuse to comply. For example, after claims were made against Greece by Norway, Sweden, Denmark, and the Netherlands during the rule of the Greek junta, Greece renounced the Convention rather than face non-compliance with a decision adverse to the Greek government. See generally Buergenthal, *Proceedings Against Greece under the European Convention of Human Rights*, 62 AM. J. INT'L L. 441 (1968).

95. For a more complete discussion of this problem, see T. BUERGENTHAL, THE EFFECT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE INTERNAL LAW OF MEMBER STATES, reprinted in EUROPEAN CONVENTION REPORT, *supra* note 49, at 79. See also ROBERTSON, *supra* note 34, at 209-12, 258-65.

96. See generally Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585 (1980).

97. BEDDARD, *supra* note 31, at 4.

98. Corporal punishment as a sentence was abolished by the Criminal Justice Act 1948, 11 & 12 Geo. 6, ch. 58, § 2. It was eliminated as a disciplinary sanction by the Criminal Justice Act, 1967, ch. 58, § 65.

99. Some territories of the United Kingdom possess independent legislative authority subject to certain reservations. One such example is the Isle of Man, which is located in the Irish Sea between Northern Ireland and the British province of Cumbria. It is governed as a crown dependency by a lieutenant governor appointed by the monarch, and by a two house legislature that is called the Court of Tynwald.

instance, the law permitted the use of corporal punishment as a sentence for a child who committed an assault.¹⁰⁰ A challenge to this law provided the European Court with its first opportunity to consider the legality of the use of corporal punishment as a sanction for criminal conduct.¹⁰¹

The European Court case, *Tyrer v. United Kingdom*,¹⁰² arose out of the sentencing of two boys by an Isle of Man juvenile court to whippings with a birch rod.¹⁰³ The boys, aged fourteen and fifteen, had pleaded guilty to unlawful assault.¹⁰⁴ Andrew Hays, the younger boy, was sentenced to receive five strokes;¹⁰⁵ Anthony Tyrer, the older boy, was sentenced to three.¹⁰⁶ Tyrer chose to appeal the sentence to the Manx Court of Criminal Appeal; Hays did not and his sentence was imposed immediately.¹⁰⁷ The appellate court dismissed Tyrer's petition and upheld the penalty, ruling that an unprovoked assault causing actual harm was always a serious offense.¹⁰⁸

After the Manx appellate court dismissed Tyrer's petition, both boys filed applications with the European Commission on Human Rights.¹⁰⁹ They asserted that section eight of the Summary Jurisdiction Act of 1960,¹¹⁰ which permitted

100. See Summary Jurisdiction Act (Isle of Man), 1960, ch. 8, § 10. Judicial corporal punishment was also permitted in Jersey and Guernsey. Berlins, *Birching is Degrading, Strasbourg Court Finds*, THE TIMES (LONDON), Apr. 26, 1978, at 1, col. 4.

101. *Tyrer v. United Kingdom*, 2 EUR. HUM. RTS. REP. 1, 3 (European Court for Human Rights, 1978).

102. *Id.*

103. *X & Y v. United Kingdom*, 1974 Y.B. EUR. CONV. ON HUMAN RIGHTS 356, 358 (Eur. Comm'n on Human Rights).

104. *Id.*

105. During the administration of the sentence, a physician reduced the penalty to three strokes. *Id.* at 358.

106. *Id.*

107. Hays assumed he had no chance of winning an appeal, since his brother had been whipped two years earlier. *Id.* His sentence was imposed the same month. Tyrer's sentence was imposed in the presence of his father and a doctor. The youth was forced to drop his trousers and underpants and bend over. While two policemen held him down, a third administered the whipping. As a result, his skin was raised, but not cut, and he was sore for approximately ten days. *Tyrer*, 2 EUR. HUM. RTS. REP. at 4.

108. *X & Y*, 1974 Y.B. EUR. CONV. ON HUMAN RIGHTS at 358.

109. Applications No. 5775/72 and 5856/72, lodged on Sept. 21, 1972 and registered on Sept. 27, 1982.

110. The Summary Jurisdiction Act (Isle of Man), 1960, provides in pertinent part:

(1) For subsection (1) of section fifty-six of the principal Act (which relates to assault and battery), there shall be substituted the following subsection —

(1) Any person who shall —

(a) unlawfully assault or beat any other person; or

(b) make use of provoking language or behavior tending to a breach of the peace, shall be liable on summary conviction to a fine not exceeding thirty pounds or to be imprisoned for a term not exceeding six months and, in addition to, or instead of, either such punishment, if the offender is a male child or male young person, to be whipped.

(2) In subsection (2) of the said section fifty-six of the principal Act (which relates to aggravated assault) for the words "twenty pounds" there shall be substituted the words "one hundred pounds or to both such imprisonment and fine."

.....

(10) Where a sentence of whipping is imposed under the Summary Jurisdiction Act —

whipping as a penalty, violated the European Convention on Human Rights. They asserted, *inter alia*, that the whippings constituted degrading punishment within the meaning of Article Three of the Convention;¹¹¹ that corporal punishment was destructive of family well-being in violation of Article Eight;¹¹² that the non-existence of national remedies to rectify the violation contravened Article Thirteen;¹¹³ and that the punishment was discriminatory within the meaning of Article Fourteen¹¹⁴ since it was usually imposed upon persons from financially and socially deprived homes.

Pursuant to its authority under the Convention, the Commission on Human Rights examined the issues and invited submissions from the United Kingdom. The government of the United Kingdom, in its submissions, chose not to challenge the admissibility of the petitions regarding Article Three but reserved its right to contest on the merits.¹¹⁵ The United Kingdom further argued that no evidence had been put forward to demonstrate discrimination under Article Fourteen,¹¹⁶ and that the violations asserted under Article Eight and Thirteen should be dismissed for failure to exhaust existing domestic remedies.¹¹⁷

In light of the submissions by all of the parties, the Commission issued

(a) the instrument used shall, in the case of a child, be a cane, and in any other case shall be a birch rod;

(b) the court in its sentence shall specify the number of strokes to be inflicted, being in the case of a child not more than six strokes, and in the case of any other person not more than twelve strokes;

(c) the whipping shall be inflicted privately as soon as practicable after sentence and in any event shall not take place after the expiration of six months from the passing of the sentence;

(d) the whipping shall be inflicted by a constable in the presence of an inspector or other officer of police of higher rank than a constable, and, in the case of a child or young person, also in the presence if he desires to be present, of the parent guardian of the child or young person.

Summary Jurisdiction Act (Isle of Man), 1960, ch. 8, §§ 1, 8.

111. Article Three states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Convention, *supra* note 32, art. 3.

112. Article Eight provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id. art. 8

113. Article 13 states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.* art. 13.

114. Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.* art. 14.

115. *X & Y*, 1974 Y.B. EUR. CONV. ON HUMAN RIGHTS at 362.

116. *Id.* at 360-62.

117. *Id.* at 360. Hays, who forewent his original appeal, had asserted these challenges. Tyrer challenged the Isle of Man statute only on Article Three grounds.

individual rulings with respect to each allegation. The Commission summarily dismissed all of the original allegations under Article Fourteen, because the applicants had withdrawn their claims regarding financial and social discrimination.¹¹⁸ The Commission ruled that the allegations under Article Eight, were inadmissible for failure to exhaust domestic remedies.¹¹⁹ It declared admissible those challenges based on Article Three, however, reasoning that corporal punishment raises substantial issues regarding torture and inhuman or degrading punishment.¹²⁰ The Commission further ruled that, insofar as the Isle of Man statute imposed corporal punishment only upon juvenile males, a challenge based on Article Fourteen was admissible.¹²¹ Subsequently, the Commission rendered an opinion¹²² saying that corporal punishment "humiliates and disgraces the offender" and therefore is a degrading punishment in violation of Article Three.¹²³

Despite its rulings, the Commission failed to resolve the controversy amicably.¹²⁴ Accordingly, the case was submitted by the Commission to the European Court.¹²⁵ Four years after the Commission's declaration of admissibility, the European Court ruled that while corporal punishment does not amount to torture or inhuman punishment, it is nevertheless degrading punishment in violation of Article Three.¹²⁶ The European Court first noted that punishment in the context of criminal sanctions, while carrying with it some degree of humiliation, cannot generally be considered degrading under Article Three.¹²⁷ Instead, the particular punishment imposed must reach an uncommon level of degradation and possess other than the usual elements of humiliation in order to violate the treaty.¹²⁸ The assessment, according to the European Court, must be made from the nature and context of the punishment and its manner of execution.¹²⁹

118. *X & Y*, 1974 Y.B. EUR. CONV. ON HUMAN RIGHTS at 366.

119. *Id.*

120. *Id.*

121. *Id.* Although the Commission declared the petition admissible on Article 14 grounds, it later decided not to pursue an examination of the issue. REPORT OF THE COMMISSION DATED DEC. 14, 1976, 24 PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS; SERIES B: PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS 10, 25-27 (1977-78).

122. *Id.*

123. *Id.* at 24.

124. Throughout the proceedings before the Commission, both the government and the residents of the Isle of Man remained steadfast in support of the use of corporal punishment. *Tyrer*, 2 EUR. HUM. RTS. REP. at 3, 5. They did so even though the British government believed judicial corporal punishment to be a violation of Article Three. Consequently, a "friendly settlement" between the parties could not be negotiated by the Commission.

125. The Commission filed the case with the Registry of the European Court on Mar. 11, 1977. See Letter from the Registry of the Court to the Permanent Representative of the United Kingdom, reprinted in 24 PUBLICATIONS OF THE EUROPEAN COURT, *supra* note 121, at 39.

126. *Tyrer*, 2 EUR. HUM. RTS. REP. at 9-12.

127. *Id.* at 9.

128. *Id.* at 10.

129. *Id.*

The European Court ruled that corporal punishment is inherently degrading, even with attendant judicial and medical safeguards and the absence of publicity.¹³⁰ Moreover, the European Court held that the enormous public support for corporal punishment on the Isle of Man did not make the practice any less degrading.¹³¹ Rather, the European Court found that the infliction of physical violence by one human being against another, especially when institutionalized by the power of the state and administered by strangers on one's bare posterior, constitutes an assault on a person's dignity and integrity.¹³² The European Court also noted that while short in actual duration, such punishment may have long term adverse psychological effects.¹³³ Moreover, the anxiety experienced during the period prior to the execution of the sentence could compound those adverse effects.¹³⁴ Thus, the European Court concluded that corporal punishment as a penal sanction creates an element of humiliation which "attain[s] the level inherent in the notion of degrading punishment."¹³⁵

The European Court purports in its reasoning to assess this particular punishment in its context. Its holding, however, must be read to ban as degrading *per se* all corporal punishment inflicted by the state as punishment for crime. No other conclusion can be reached, given the fact that procedural safeguards were in effect, and also given the fact the actual physical injury in this case, while significant, was neither long lasting nor permanently disfiguring. Furthermore, there was no evidence of psychological damage either from the punishment or from the period of waiting which preceded it. Indeed, the period preceding the punishment was extended by Tyrer's decision to appeal. Consequently, the manner of execution and its effects cannot be said to have increased the degrading nature of the punishment. Moreover, the punishment in the context of its cause was arguably not out of proportion. Thus, the rationale for finding the punishment degrading can only be the nature of the punishment itself.¹³⁶ It is the nature of physical violence inflicted by an officer of the state against another person for penal purposes that makes this punishment rise above the normal level of humiliation that accompanies any other punishment.¹³⁷

130. *Id.* at 11.

131. *Id.* at 10.

132. *Id.* at 11-12.

133. *Id.* at 11.

134. *Id.*

135. *Id.* at 11-12.

136. The dissenting judge recognized that the rationale for finding the punishment degrading can only be the nature of the punishment. *Tyrer*, 2 EUR. HUM. RTS. REP. at 19-20 (Fitzmaurice, J., dissenting in part). He condemns the use of corporal punishment for adults while sustaining its validity for children. *Id.* at 22-23.

137. Interestingly, the death penalty is not prohibited by the Convention even though it, too, involves physical violence inflicted by an officer of the state for penal purposes. See Convention, *supra* note 32, art. 2(1). The British government argued that if capital punishment was permitted, corporal punishment could not be prohibited. REPORT OF THE COMMISSION, 24 PUBLICATIONS OF THE EUROPEAN COURT, *supra* note 121, at 20.

Notwithstanding what may be a laudable result, the European Court's reasoning is subjective and leaves much to be desired. The purpose of the Convention is, in part, to forever prohibit those actions which are universally condemned as repugnant.¹³⁸ Some activities, such as torture, are easily recognized and universally condemned. Degrading punishments, however, are not so easily distinguished. The word "degrading" lends itself to many interpretations. The European Court's reasoning gives no clear guidelines by which to define the word. Further, it would appear that general international consensus is not a determinant as it is in other areas of international law. While the European Court has provided some subjective guidelines, it is difficult to determine with any certainty what future actions could be considered degrading in the context of penal sanctions.

The use of this subjective standard, rather than a universal consensus, can cause problems for the Convention's signatories as well as for the European Court. For example, the European Court's stature in the United Kingdom has suffered to some extent.¹³⁹ Indeed, despite the *Tyrer* decision, corporal punishment still has adherents on the Isle of Man. The Manx legislation has never been altered, and the United Kingdom has refused to renew the declarations regarding the right of individual petition pursuant to the Convention for citizens of the Isle of Man.¹⁴⁰ Nonetheless, the Manx chief judicial officer recently informed all persons on the Isle of Man who are empowered to pass sentence that corporal punishment violates the Convention.¹⁴¹ Accordingly, the Manx Court of Appeal recently set aside a sentence of corporal punishment based on the *Tyrer* judgment.¹⁴² Thus, it would seem that despite the continued statutory acceptance of corporal punishment for penal violations on the Isle of Man, the use of corporal punishment, for all practical purposes, has been eliminated from the United Kingdom.¹⁴³

B. *United States*

Although corporal punishment was as common a penalty in early America as it was in Britain, it was banned as an authorized adult criminal sanction in the United States in the nineteenth century and has recently been prohibited as a

138. This is clear from the Preamble to the Convention and its invocation of the Universal Declaration of Human Rights, first proclaimed by the United Nations on Dec. 10, 1948. See also BEDDARD, *supra* note 31, at 14, 15.

139. See Zellick, *Corporal Punishment on the Isle of Man*, 27 INT'L & COMP. L.Q. 665 (1978).

140. Zeilner, *Beating is Better*, 1982 PUB. LAW. 4.

141. 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 654, 658.

142. *Id.* at 5.

143. Consideration is currently being given to prohibiting corporal punishment in community children's homes as well. Healy, *Call to Outlaw Cane in Children's Homes After Verdict on Birch*, THE TIMES (LONDON), Apr. 27, 1978, at 4, col. 1.

disciplinary sanction as well.¹⁴⁴ Because of its gradual demise, the legal acceptance of corporal punishment has been the subject of only one reported case in recent history.¹⁴⁵ In *Jackson v. Bishop*,¹⁴⁶ the Court of Appeals for the Eighth Circuit considered the legality of the use of corporal punishment as a sanction for disciplinary violations in prisons. The case was filed by several Arkansas state inmates who challenged the authority of prison officials to whip prisoners when disciplinary rules were violated. These punishments were administered at the sole discretion of prison officials.¹⁴⁷ The inmates claimed that the whippings constituted "cruel and unusual punishment" within the meaning of the eighth amendment to the U.S. Constitution.¹⁴⁸ The Eighth Circuit upheld the prisoners' contentions, and ruled that disciplinary whippings are indeed cruel and unusual punishment in violation of the eighth amendment.¹⁴⁹

Violations of the eighth amendment have traditionally been found when a punishment is barbaric or inhuman, disproportionate, or when imposed for non-criminal acts.¹⁵⁰ Although the *Jackson* court believed it was applying a traditional eighth amendment analysis, its specific rationale is somewhat elusive. The *Jackson* court stated merely that the use of corporal punishment in prisons "offends contemporary concepts of decency and human dignity,"¹⁵¹ and "is degrading to the punisher and the punished alike."¹⁵²

The U.S. Supreme Court has neither specifically addressed the issue of corporal punishment in the penal context, nor offered significant guidance regarding its views on the subject.¹⁵³ It has suggested, however, that the determination

144. See, e.g., *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968); 18 U.S.C. § 2191 (1970)(outlawing flogging of sailors on United States ships); Telephone interview with Hardy Rauch of the American Corrections Association, conducted by Margaret Danaher (Dec. 4, 1983).

145. See *Jackson*, 404 F.2d 571. The issue was raised in earlier cases and resolved in a manner which permitted the administration of corporal punishment. See, e.g., *State v. Revis*, 193 N.C. 192, 136 S.E. 346 (1927); *Westbrook v. State*, 133 Ga. 578, 66 S.E. 788 (1909). The issue of beatings was raised in later cases, but the cases involved isolated or non-sanctioned instances, not systematic and authorized practices. See, e.g., *Wiltsie v. California Dep't of Corrections*, 406 F.2d 515 (9th Cir. 1969); *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973).

146. 404 F.2d 571 (8th Cir. 1968).

147. The punishment specifically complained of in *Jackson* was the use of the strap. Such straps were made of leather, 3 1/2 to 5 1/2 feet in length, 4 inches wide and 1/4 inch thick. *Id.* at 574. They were mounted on wooden handles 8 to 12 inches long. *Id.* The disciplinary whippings of the kind challenged in *Jackson* were limited to a maximum of ten strokes on the buttocks. *Id.*

148. The eighth amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

149. *Jackson*, 404 F.2d at 580-81.

150. See *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

151. *Jackson*, 404 F.2d at 579.

152. *Id.* at 580.

153. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), for instance, Justice Harlan noted that petty offenses were once punished by whipping. *Id.* at 191-92 (Harlan, J., dissenting). Seventy-five years earlier, in *O'Neill v. Vermont*, 144 U.S. 323 (1892), Justice Field recognized the repulsiveness of whippings but acknowledged the state's authority to impose such a punishment. *Id.* at 340 (Field, J., dissenting). See also *Ingraham*, 430 U.S. 651.

of "cruel and unusual" or "inhuman or barbaric" punishment is inherently subjective.¹⁵⁴ Whether the Supreme Court would find corporal punishment to be inhuman, barbaric, cruel, or unusual, therefore, remains an open question.

Although the Supreme Court long ago ruled that torture offends human dignity,¹⁵⁵ it is unclear whether other impositions of physical pain, especially when considered in light of public opinion,¹⁵⁶ are similarly unlawful. Certainly pain is a factor in determining the lawfulness of physical punishment.¹⁵⁷ Intentional mental anguish may also be a factor.¹⁵⁸ Most punishments, however, involve some pain and mental anguish. Capital punishment, equal to or more painful and mentally disturbing than other physical punishments, has been held not violative of the eighth amendment.¹⁵⁹ On the other hand, corporal punishment as a penal sanction no longer exists in the United States even though it is clearly part of its history.¹⁶⁰ These factors, viewed in combination with the general societal acceptance of corporal punishment in other contexts,¹⁶¹ lead to the conclusion that the lawfulness of corporal punishment as a matter of constitutional law remains uncertain. In general, U.S. citizens and courts do not seem opposed to acts of moderate corporal punishment, at least against children. Thus, it is not possible to state with any certainty that contemporary standards of decency in the United States have evolved to a point where moderate corporal punishment, as a constitutional matter, is no longer acceptable.¹⁶² Analyzing severe (as opposed to moderate) corporal punishment, however, may result in a different conclusion.¹⁶³

Even if the imposition of corporal punishment upon adults could not be banned entirely by the eighth amendment, it nevertheless could be banned in circumstances where it is found to be disproportionate to the offense for which it is imposed. The concept of proportionality has its roots in the common law¹⁶⁴ and has been recognized as part of the eighth amendment for at least ninety

154. This subjective judgment has been phrased in many ways. In one opinion, for example, it was described as that which "shocks the most fundamental instincts of civilized man." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 (1947) (Burton, J., dissenting). In another opinion, the Supreme Court found it to be "a fate forbidden by the principle of civilized treatment. . . ." *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

155. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

156. *Ingraham*, 430 U.S. at 662-63.

157. *Weems v. United States*, 217 U.S. 349, 366 (1910).

158. *Cf. Resweber*, 329 U.S. 459.

159. *Gregg v. Georgia*, 428 U.S. 143 (1976).

160. Only two states had retained flogging as a disciplinary measure in 1968. *Jackson*, 404 F.2d at 580. No state currently sanctions disciplinary whippings. *See supra* note 144 and accompanying text.

161. *See infra* notes 231-301 and accompanying text.

162. *See infra* note 277 and accompanying text.

163. *See infra* notes 284-301 and accompanying text.

164. *Solem v. Helm*, ___ U.S. ___, 77 L.Ed.2d 637, 645 (1983).

years.¹⁶⁵ There can be no doubt today that a punishment must be proportionate to the offense for which it is imposed.¹⁶⁶

In determining whether a punishment is disproportionate, the Supreme Court in *Solem v. Helm*¹⁶⁷ emphasized the necessity of looking to the gravity of the offense and harshness of the penalty;¹⁶⁸ of comparing the sentence to other sentences in the jurisdiction;¹⁶⁹ and of comparing the sentence imposed to other sentences imposed for similar activity in other jurisdictions.¹⁷⁰ When compared to laws permitting corporal punishment for discipline violations in school, whippings for penal purposes do not appear to be disproportionate. Yet no state today imposes whippings as a punishment for crime, although such punishments were common in the past.¹⁷¹ Similarly, states no longer permit corporal punishment as a disciplinary sanction against prisoners.¹⁷² Consequently, should a state attempt to impose whipping of adults as a penalty for criminal offenses or prison disciplinary violations, an eighth amendment attack based on the *Solem v. Helm* criteria could be persuasive.

Despite its claims, the *Jackson* court never really analyzed the issue in traditional eighth amendment terms. Rather, like the European Court in *Tyrer*, it merely concluded that corporal punishment is degrading and therefore an inappropriate sanction for prison disciplinary infractions by adults. It cited no authority for its position and its major rationale was its opinion that whippings are degrading to punisher and punished alike. Thus, the eighth amendment, like the Convention article construed in *Tyrer*, lends itself to subjective interpretations and results in judicial opinions based on the desirability of the outcome, rather than on an objective rationale. It would seem, however, that given rules for constitutional interpretation, U.S. courts should be more inclined than the *Tyrer* court to assess public opinion in determining contemporary standards. The *Jackson* court, however, was not so inclined. Furthermore, its opinion remains the last word on corporal punishment of adults, and is likely to remain so for some time.

Even assuming the correctness of *Jackson*, its rationale may not apply to physical punishment of children who have violated the law. The Supreme Court has never specifically applied the eighth amendment to juvenile delinquency proceedings, although its applicability has been suggested.¹⁷³ Whipping is not

165. *O'Neill v. Vermont*, 144 U.S. at 339-40 (Field, J., dissenting).

166. *Solem*, ___ U.S. at ___, 77 L.Ed.2d. at 647. *But see* *Pulley v. Harris*, ___ U.S. ___, 52 U.S.L.W. 4141 (1984).

167. *Solem*, ___ U.S. ___, 77 L.Ed.2d. 637.

168. *Id.*, ___ U.S. at ___, 77 L.Ed.2d. at 649.

169. *Id.*, ___ U.S. at ___, 77 L.Ed.2d. at 650.

170. *Id.*

171. *See supra* note 144.

172. *Id.*

173. *Ingraham*, 430 U.S. at 669 n.37.

specifically sanctioned as a penalty for delinquent acts in any state.¹⁷⁴ The broad authority of courts to fashion rehabilitative sentences, however, could be read to permit corporal punishment.

Corporal punishment is also no longer authorized as a disciplinary sanction in juvenile delinquency institutions.¹⁷⁵ Most lower courts that have considered the issue have held that the eighth amendment applies to juvenile institutions and that corporal punishment is prohibited there.¹⁷⁶ Like the *Jackson* and *Tyrer* cases, however, the courts so ruling make conclusions rather than provide rationale. None of the courts considering the issue have analyzed corporal punishment in terms of inhuman punishments, disproportionality, or the nature of the act made punishable. The opinion of the Seventh Circuit in *Nelson v. Heyne*¹⁷⁷ is often cited as authority by other courts for the proposition that corporal punishment as a sanction for disciplinary violations in correctional institutions for children violates the eighth amendment. That opinion, however, merely cites *Jackson*.¹⁷⁸ The opinion in *Morales v. Turman*¹⁷⁹ is neither clearer nor more persuasive. These courts, like the European Court in *Tyrer*, have failed to specifically address the questions that arise regarding the historically different standards applicable to children. Thus, courts in the United States, like the European Court in *Tyrer*, regularly make the assertion of invalidity without significant analysis. Given the Supreme Court's pronouncements in school cases and the general societal acceptance of corporal punishment, the legal underpinning of these cases is weak even though the outcome is desirable. Nonetheless, in the absence of new regulations, it is evident that corporal punishment is no longer a permissible sanction for crimes or for disciplinary infractions in penal or juvenile institutions in the United States.¹⁸⁰

IV. CORPORAL PUNISHMENT IN THE EDUCATIONAL SYSTEM

A. *United Kingdom*

Issues regarding corporal punishment in relation to rights guaranteed by the European Convention arose again in 1976. Although the British government

174. See *supra* note 144.

175. *Id.*

176. See, e.g., *Nelson v. Heyne*, 355 F. Supp. 451, 459 (N.D. Ind. 1973), *aff'd* 491 F.2d 352 (7th Cir.), *cert. denied* 417 U.S. 976 (1974). *Santana v. Collazo*, 533 F. Supp. 966, 977 (D.P.R.) *aff'd in part and vacated and rev'd in part*, 714 F.2d 1172 (1st Cir. 1983); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Lollis v. New York Dep't of Social Services*, 322 F. Supp. 473, 482 (1970).

177. 491 F.2d 352 (7th Cir.), *cert. denied* 417 U.S. 976 (1974).

178. *Nelson*, 355 F. Supp. at 454.

179. 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd and remanded for decision on merits*, 430 U.S. 322 (1977); *on remand* 562 F.2d 993 (5th Cir.), *reh'g denied* 565 F.2d 1215 (1977).

180. Physical force used in self defense or to subdue an aggressor is not prohibited. See, e.g., *West Virginia ex rel. Werner*, 242 S.E.2d 907 (W.Va. 1978); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1300 (D. Tex.

had begun to discourage the use of corporal punishment in schools,¹⁸¹ it still existed in most parts of the United Kingdom. A typical punishment in English schools was whipping with a cane.¹⁸² In Scottish schools, the usual punishment consisted of striking the palms of a student's hands with a leather strap commonly known as a tawse.¹⁸³

In Scotland, two mothers protested the use of corporal punishment as a method for disciplining their school age sons. One of the mothers, Mrs. Campbell, had requested that the Strathclyde Regional Council guarantee that her seven year old son, Gordon, would not be subject to corporal punishment.¹⁸⁴ While no guarantee was given, her son was never so punished.¹⁸⁵ The second mother, Mrs. Cosans, had a fourteen year old son who violated a minor rule of

1980) *aff'd in part and rev'd in part*, 679 F.2d 1115, (5th Cir. 1982), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982) *cert. denied* 103 S.Ct. 1438 (1983).

181. As early as 1968, the Secretary of State for Scotland had promulgated a booklet entitled *THE ELIMINATION OF CORPORAL PUNISHMENT IN SCHOOLS: STATEMENT OF PRINCIPLES AND CODE OF PRACTICE* [hereinafter cited as *CODE OF PRACTICE*]. The *CODE OF PRACTICE* was reissued in 1972 and reflected a general belief that corporal punishment should slowly be eliminated from the schools in the United Kingdom. It provides in pertinent part:

Until corporal punishment is eliminated, its use should be subject to the following rules:

- (i) It should not be administered for failure or poor performance in a task, even if the failure (e.g. errors in spelling or calculations, bad homework, bad handwriting, etc.) appears to be due not to lack of ability or any other kind of handicap but to inattention, carelessness or laziness. Failure of this type may be more an educational and social problem than a disciplinary one, and may require remedial rather than corrective action.
- (ii) Corporal punishment should not be used in infant classes. Its elimination from infant classes should be followed by progressive elimination from other primary classes.
- (iii) In secondary departments, only in exceptional circumstances should any pupils be strapped by a teacher of the opposite sex or girls be strapped at all.
- (iv) Corporal punishment should not be inflicted for truancy or lateness unless the head teacher is satisfied that the child and not the parent is at fault.
- (v) The strap should not be in evidence, except when it is being used to inflict corporal punishment.
- (vi) Where used, corporal punishment should be used only as a last resort, and should be directed to punishment of the wrong-doer and to securing the conditions necessary for order in the school and for work in the classroom.
- (vii) It should normally follow previous clear warnings about the consequences of a repetition of misconduct.
- (viii) Corporal punishment should be given by striking the palm of the pupil's hand with a strap and by no other means whatever.

1972 *CODE OF PRACTICE* at § 6.

182. M. Freerman, *The Right of the Child in England*, cited in *LAW AND THE STATUS OF THE CHILD* 601, 653 (A. Pappas ed. 1983).

183. In Scotland, punishment for misconduct in the classroom is administered immediately, in the presence of the class. For misconduct elsewhere and for serious misconduct, punishment is administered by the headmaster or his deputy in a private room. *Campbell & Cosans v. United Kingdom*, 4 *EUR. HUM. RTS. REP.* 293, 297 (1982).

184. The administration of the Scottish educational system was regulated by the Education (Scotland) Act of 1952, ch. 47 § 1, which was repealed and reenacted without material change by the Education Act (Scotland), 1980, ch. 44, § 1. Pursuant to that statute, the central government of Scotland formulates general policy, promotes legislation, and exercises supervision of the schools. The primary responsibility for organizing educational facilities is vested in regional educational authorities who are required to ensure that adequate and efficient provision of school education is made.

185. *Campbell*, 4 *EUR. HUM. RTS. REP.* at 295.

his school and was subsequently ordered to present himself for corporal punishment.¹⁸⁶ Jeffrey Cosans, on his father's advice, presented himself to the school authorities but refused to accept the punishment.¹⁸⁷ As a result, he was immediately suspended.¹⁸⁸ After three and one-half months, the senior assistant director of education agreed to lift the suspension and rescind the punishment if the Cosans boy agreed to abide by the rules of the school.¹⁸⁹ The Cosans family, however, refused to accept the school rules permitting corporal punishment.¹⁹⁰ Consequently, the suspension remained in effect, and the parents were threatened with prosecution for failure to comply with the compulsory education law.¹⁹¹ Jeffrey Cosans never did return to school.¹⁹²

The parents of both the Cosans and Campbell boys filed applications with the Commission on Human Rights alleging that the United Kingdom violated Article Three of the Convention, because corporal punishment amounts to torture or inhuman or degrading punishment.¹⁹³ They also alleged a violation of Article Two, Protocol One, since the use of corporal punishment interferes with the student's right to education and the parents' right to insure that the education of their children is in conformance with their own philosophical convictions.¹⁹⁴

The Commission ruled that the application was admissible. In its opinion, the Commission stated that disciplinary measures are a function assumed by the state in relation to education and teaching, because the moulding of character is as much an educational concern as is the moulding of mental powers.¹⁹⁵ It further stated that respect must be given to religious or philosophical convictions regarding discipline.¹⁹⁶ With respect to the facts of this case, the Commission found that the parents' views on the threatened use of physical violence as a means of maintaining discipline were views of a "clear moral order concerning human behavior,"¹⁹⁷ and therefore constituted philosophical convictions as contemplated by the Convention.¹⁹⁸ Thus, the Commission concluded that the

186. Jeffrey Cosans had taken a short cut home through a cemetery from his school, which was located in the Fife region of Scotland. *Id.* at 296.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *See supra* note 111.

194. The full text of Article Two, Protocol One provides: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to insure such education and teaching in conformity with their own religious and philosophical conviction." Convention, *supra* note 32, art. 2.

195. *Campbell & Cosans v. United Kingdom*, 3 EUR. HUM. RTS. REP. 531, 537 (Eur. Comm'n on Human Rights, 1980).

196. *Id.* at 538.

197. *Id.* at 541.

198. *Id.*

second part of Article Two, Protocol One had been violated.¹⁹⁹ The Commission refused to render an opinion regarding a violation of the first part of Article Two, Protocol One, concerning the denial of education which the Cosans' raised in light of their son's suspension.²⁰⁰ Finally, it stated that no violation of Article Three had occurred since the punishment was never implemented, and since the threat did not reach the level of degrading punishment in this specific case.²⁰¹

After attempts at friendly settlement failed, the Commission submitted the case to the European Court. In the European Court, both sets of parents and the United Kingdom renewed the arguments made before the Commission. The British government argued, as it did before the Commission, that no breach of Article Three had occurred since corporal punishment was never inflicted.²⁰² The government further argued that attitudes regarding corporal punishment should not be considered philosophical convictions under the terms of the treaty²⁰³ and that, even if they were so considered, Article Two, Protocol One applies to the function of education and not to the function of discipline.²⁰⁴

In its opinion in *Campbell*, the European Court began by noting that the right to use corporal punishment is controlled by English common law and is based upon the duty of teachers to supervise children in their care.²⁰⁵ The European Court recognized as well that the power to punish corporally is limited by civil and criminal concepts of assault. Nonetheless, it indicated that local law had never been held to supersede the Convention once a nation binds itself to that treaty.²⁰⁶

In *Campbell*, the European Court found no instance of inhuman punishment, since corporal punishment was never inflicted upon Cosans or Campbell.²⁰⁷ The European Court did indicate that while the threat of corporal punishment could fall within Article Three's prohibition of inhuman treatment, the suffering in *Campbell* did not rise to the level that would normally be recognized as a violation.²⁰⁸ In considering the notion of degrading, as distinct from inhuman, punishment in light of *Tyrer*,²⁰⁹ the European Court found no violation since neither Campbell nor Cosans was actually whipped, and also because the risk of punishment alone did not create humiliation or debasement rising to the level of degrading punishment.²¹⁰

199. *Id.* at 543. Five Commissioners dissented. *Id.* at 549.

200. *Id.* at 545. One Commissioner dissented. *Id.* at 552.

201. *Id.* at 549. One Commissioner dissented. *Id.* at 554.

202. *Campbell*, 4 EUR. HUM. RTS. REP. at 300-01.

203. *Id.* at 300, 303-04.

204. *Id.* at 304, 305.

205. *Id.* at 296.

206. *Id.* at 296.

207. *Id.* at 302.

208. See *Ireland v. United Kingdom*, 2 EUR. HUM. RTS. REP. 25 (1978).

209. See *supra* note 125-37 and accompanying text.

210. A violation can nonetheless still occur if medical or other evidence indicates adverse psychological effects. *Campbell*, 4 EUR. HUM. RTS. REP. at 302.

The European Court had far more difficulty in considering the petitioners' claim under Article Two, Protocol One, since such claims require an interpretation of some very elusive concepts. The British government maintained that discipline is not a function in relation to education or teaching, but rather is a function of administration ancillary to the educational process.²¹¹ The European Court found this distinction somewhat artificial, ruling that discipline is an integral part of the process of molding character or mental power.²¹² The government also argued that the obligations regarding philosophical convictions do not arise in regard to mere opinions about school administration, but become operative only in relation to the content and mode of conveying information.²¹³ With respect to this argument, the European Court first ruled that "convictions" do not mean mere opinions, but rather are more akin to the word "beliefs." "Beliefs," the European Court held, denote views which attain a certain level of "cogency, seriousness, cohesion and importance."²¹⁴ The European Court, obtaining guidance from the *travaux préparatoires* of the Convention, defined "philosophical" as relating to "a weighty and substantial aspect of human life and behavior."²¹⁵ Applying these definitions to the case at bar, the European Court ruled that the parents' attitudes regarding corporal punishment are philosophical convictions regarding education.²¹⁶ It further held that beliefs regarding corporal punishment to be qualitatively different from those regarding other methods of discipline which were not a concern of the Convention.²¹⁷ Consequently, the European Court concluded that corporal punishment, when administered in disregard of a parent's wishes, is a violation of Article Two, Protocol One of the Convention.²¹⁸ The European Court further held that, since the continued suspension of the Cosans boy was the result of a violation of Article Two, Protocol One, the boy's own right to education guaranteed by the first sentence of that Article also had been violated.²¹⁹

The method used by the European Court in deciding the *Campbell* case is more satisfying and more firmly based than that used to decide *Tyrer*. The concept of family integrity is recognized in all countries. While one might question whether there is an international consensus regarding the use of corporal punishment,²²⁰

211. *Id.* at 302, 303.

212. *Id.* at 302, 303. The European Court also was not persuaded by the argument that the government had no role in the maintenance of discipline and administration of punishment, since individual teachers controlled both.

213. *Id.* at 303, 304.

214. *Id.* at 304. The European Court also looked to the nuances in the French word "convictions" in making its decision. French and English are both official languages of the Convention.

215. *Id.* at 305.

216. *Id.* at 305-06.

217. *Id.*

218. *Id.* at 308. Specifically, such corporal punishment violates the second sentence of Article Two, Protocol One.

219. *Id.* at 308.

220. See *Ingraham*, 430 U.S. 651.

few would deny that there is a general international consensus with respect to the primary role of parents in the upbringing of children. While the state may have a legitimate interest in controlling classroom behavior, and while the degree of parental (as opposed to state) control of education may be debatable, it is not unreasonable to limit the state's authority in the realm of personal integrity to activities which are in accordance with parental wishes.

The European Court's method of consideration, however, still leaves unanswered the question of whether the actual use of corporal punishment in public schools is a violation of Article Three, as it is in penal institutions. If *Tyrer* can be read to mean that all corporal punishment sanctioned by the government and actually inflicted by strangers is *per se* degrading,²²¹ then the use of corporal punishment in school must be prohibited regardless of either parental or community wishes. If the safeguards surrounding the administration of punishment or the purposes for its imposition are to be considered, as suggested but not really done by the European Court in *Tyrer*,²²² then the status of corporal punishment is slightly less clear. A slap on the hands is certainly less humiliating than a whipping on the bare buttocks. On the other hand, criminal violations must be considered more serious than violations of school regulations. Thus, corporal punishment in the penal context can be seen as more justified than in the educational context. Nevertheless, corporal punishment in the penal context was ruled a violation of Article Three.²²³ If it cannot be used for a serious social breach, it would seem, *a fortiori*, it cannot be used in schools without also violating the Convention.

In response to the European Court's decision in *Campbell*, the British government has announced its intention to propose legislation which permits parents to exempt from corporal punishment children being schooled in England and Wales.²²⁴ Corporal punishment *per se*, however, will not be abolished. The Secretary of State for Northern Ireland will be proposing similar legislation,²²⁵ all of which should be ready by November, 1984.²²⁶ The Scottish Office for Education intended to end corporal punishment entirely by the summer of 1984 without legislation,²²⁷ but had not accomplished its goal by that date.

It would seem unlikely that the European Court would render an opinion regarding the actual use of corporal punishment of children in school, since the

221. See *supra* notes 130-37 and accompanying text.

222. See *supra* notes 130-37 and accompanying text.

223. See *supra* notes 130-35 and accompanying text.

224. See U.K. DEP'T OF EDUC. AND SCIENCE, CORPORAL PUNISHMENT IN SCHOOLS: A CONSULTATIVE DOCUMENT, JULY 28, 1983. See also CORPORAL PUNISHMENT VETO FOR PARENTS, U.K., DEPT. OF EDUC. AND SCIENCE, Press Notice No. 250/83, July 28, 1983.

225. See Statement of Sir Joseph Keith, Secretary of State for Education in England (July 28, 1983), reported in Hodges, *Decision to Give Parents Choice on the Cane Criticized as Unworkable*, The Times (London), July 29, 1983 at 3, col. 4, 5.

226. *Id.*

227. *Id.*

children physically punished after *Campbell* should consist solely of those whose parents have consented to it.²²⁸ Presumably, violations will now be remedied in the domestic courts. Furthermore, all other signatories to the Convention already ban it.²²⁹ Nonetheless, because the government has taken so long to implement the European Court's decision, at least six cases are currently pending with the Commission challenging British corporal punishment practices.²³⁰

B. *United States*

1. Parental Discretion

The U.S. Supreme Court ended the debate concerning parental authority with regard to corporal punishment in public schools in a much less ceremonial manner than the European Court, and in a completely opposite fashion. In *Baker v. Owen*²³¹ a parent sued North Carolina school officials after her sixth grade son was physically punished in contravention of her request that he be exempt from such punishment. Her son, Russell Baker, received a two stroke whipping with a ruler-sized drawer divider.²³² The beating resulted in bruises, but it was by no means severe.²³³ Although North Carolina law authorized teachers to administer corporal punishment,²³⁴ Mrs. Baker opposed it on principle. She alleged that her

228. Protocol Two permits the court to render advisory opinions. Such opinions, however, cannot be rendered with respect to rights guaranteed by the Convention. Given the result of the *Campbell* decision, it is likely the corporal punishment will only be used upon students whose parents do not object. Consequently, it is unlikely that a case involving the applications of Article Three will ever reach the Court. Nonetheless, the United Kingdom's slow pace in enacting legislation has resulted in the filing of such cases.

229. Ghandi, *Spare the Rod: Corporal Punishment in Schools and the European Convention on Human Rights*, 33 INT'L & COMP. L.Q. 488 (1984).

230. *Id.* at 488. The Children's Legal Center in London reports that more than forty cases are pending. 10 CHILDRIGHT 2 (1984). In *X v. United Kingdom*, 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 268, the question of whether corporal punishment violated Article Three was addressed. The case was resolved by friendly settlement, however. 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 402. See Andrews, *Current Survey of the Council of Europe*, 7 EUR. L. REV. 242, 244 n.4 (1982).

231. 395 F. Supp. 294, 295 (M.D.N.C.) *aff'd* 423 U.S. 907 (1975).

232. *Id.* at 296.

233. *Id.* at 303.

234. N.C. GEN. STAT. §§ 115-146 (repealed 1983). The current North Carolina law, virtually identical to the second paragraph of former § 115-146 (which was upheld as constitutional in *Baker*), provides: *School personnel may use reasonable force.*

Principals, teachers, substitute teachers, voluntary teachers, teachers' aides and assistants and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. No local board of education or district committee shall promulgate or continue in effect a rule, regulation or bylaw which prohibits the use of such force as is specified in this section.

N.C. GEN. STAT. § 115c-390 (1983).

parental right to determine discipline, as guaranteed by the fourteenth amendment²³⁵ to the U.S. Constitution, had been violated.²³⁶

The constitutional stature of parental rights has been recognized by the Supreme Court for many years in several different contexts. In *Meyer v. Nebraska*,²³⁷ while striking down a statute that prohibited foreign language instruction in school, the Supreme Court ruled that the right to marry, to establish a home, and to bring up children was a liberty interest²³⁸ protected by the fourteenth amendment.²³⁹ The Court held that the Nebraska statute violated parents' rights since it interfered with their primary role in determining a proper education for their children.²⁴⁰ Similarly, in *Pierce v. Society of Sisters*,²⁴¹ the Court ruled that a statute forbidding private school attendance was unconstitutional because it interfered with the parents' liberty to control the education and development of their children.²⁴² Many cases since have also recognized that, under the U.S. Constitution the custody, care, and nurture of children resides first with parents.²⁴³

Although the U.S. District Court for the Middle District of North Carolina in *Baker* recognized that constitutionally protected liberty interests were implicated in Mrs. Baker's claim, it refused to recognize as fundamental the parental right to determine disciplinary methods.²⁴⁴ The court acknowledged that prior cases could be read as holding that some aspects of parenting rose to the level of a fundamental right. In the court's view, however, convictions regarding corporal punishment did not rise to such a level.²⁴⁵ Specifically, the court reasoned that in all other cases involving parental rights, a "venerable" parental interest "worthy

235. The fourteenth amendment to the U.S. Constitution reads, in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

236. *Baker*, 395 F. Supp. at 296. Mrs. Baker also alleged fourteenth amendment procedural due process violations and eighth amendment cruel and unusual punishment violations on behalf of her son. *Id.*

237. 262 U.S. 390 (1923).

238. Liberty interests, or rights of personhood, stemming from various sources including natural law, the common law, and history, generally encompass those activities beyond the scope of government power to regulate. For a more complete discussion, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, ch. 11, 15 (1978).

239. 262 U.S. at 400.

240. *Id.*

241. 268 U.S. 510 (1925).

242. *Id.* at 534, 535.

243. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

244. The fourteenth amendment fundamental interests used in equal protection analyses bear close resemblance to substantive due process liberty or personhood interests in that they protect similar rights without clear support in constitutional text. See G. GUNTHER, *CONSTITUTIONAL LAW*, ch. 10 (10th ed. 1980).

245. *Baker*, 395 F. Supp. at 300.

of great acceptance due to its unquestioned deference throughout history"²⁴⁶ was at stake. In *Meyer*, the right to education was at stake; in *Pierce and Prince v. Massachusetts*,²⁴⁷ religious training was at issue. In each case, the specific parental concern had enjoyed unquestioned acceptance throughout history. The *Baker* court, however, found that the opposition to corporal punishment was not only not a universally venerated parental interest, but was in fact contrary to tradition and not likely to achieve universal societal respect in the near future.²⁴⁸ Consequently, only the lesser standard of constitutional review was required when balancing parental and state interests.²⁴⁹ Finding a legitimate and substantial state interest in the maintenance of discipline and order and a relationship between that and corporal punishment, the *Baker* court refused to hold that the North Carolina statute had violated the U.S. Constitution.²⁵⁰ The Supreme Court affirmed the district court's reasoning without opinion, thereby permitting U.S. schools to authorize corporal punishment of children despite parental desires to the contrary.²⁵¹

Despite the contrary results, there are many similarities between the reasoning in *Campbell* and that in *Baker*. In each case, parental preferences were at issue rather than the nature of the punishment itself. In each, the courts took notice of the primary role of parents in child-rearing practices. In each case, the courts noted that corporal punishment, subject to criminal and civil penalties for excessive acts, had historically retained societal approval. Finally, each court recognized that discipline was necessary if schools are to fulfill their educational mission. The difference between the cases, however, arises out of the relative importance that each court gave to these factors. The European Court found the principle of the Convention absolute, and therefore not subject to balancing against governmental interests. Thus, difficulties in school administration and the existence of societal acceptance did not obviate the United Kingdom's obligation to comply with the Convention. In the United States, constitutional rights are seldom absolute. They are generally balanced against the perceived need of the government to override individual rights. In *Baker*, the court found the parental prerogative to be less important than the governmental interest, especially in light of the societal acceptance of corporal punishment, and less compelling than the governmental need to maintain order. Thus, the result was different in *Baker* than in *Campbell*.

246. *Id.*

247. 321 U.S. 158 (1944).

248. *Id.*

249. If the rights were viewed as fundamental, the government would have to show a compelling interest for the law and a very close fit between ends and means. If not, the standard of reasonableness would apply. See GUNTHER, *supra* note 244, at 671.

250. 395 F. Supp. at 301.

251. *Baker*, 395 F. Supp. 294, *aff'd* 423 U.S. 907 (1975). The Supreme Court has subsequently cited this case with approval. *Ingraham*, 430 U.S. 651, 662 n.22.

As a practical matter, therefore, in the absence of specific state statutory prohibition, parents' wishes regarding the use of corporal punishment, no matter how sincere, have no effect on school disciplinary policy in the United States.²⁵² As of this writing only California,²⁵³ Georgia,²⁵⁴ Illinois²⁵⁵ and Pennsylvania,²⁵⁶ all of which permit corporal punishment generally, allow parents to exempt their children from the imposition of corporal punishment in school. The practices in these states will thus be similar to the practices in Great Britain after the passage of its proposed legislation. In the other states, except those with a total ban,²⁵⁷ no protection will be forthcoming.

2. Cruel and Unusual Punishment

Attacks based upon the punishment itself have fared little better than those based on parental control. In *Ingraham v. Wright*,²⁵⁸ the petitioners alleged that corporal punishment of children in the Dade County, Florida public schools violated the eighth amendment's prohibition against cruel and unusual punishment.²⁵⁹ The children involved had been paddled in accordance with a state law that prohibited degrading punishments but permitted corporal punishment.²⁶⁰

252. It is unlikely that the United States will ratify the American Convention *Supra* note 31, in the near future. Thus, no treaty obligations will be available.

253. CAL. EDUC. CODE § 49001 (West 1978).

254. GA. CODE ANN. § 20-2-731(5) (1982).

255. ILL. BD. OF EDUC. DOC. NO. 1 (1977), cited in PAQUET, *supra* note 5, at 75, 76.

256. PA. REG. ON STUDENT RIGHTS AND RESPONSIBILITIES § 12.5, cited in PAQUET, *supra* note 5, at 89.

257. See *supra* note 24.

258. 430 U.S. 651 (1977).

259. See *supra* note 148.

260. In the 1970-71 school year, FLA. STAT. § 232.27 provided:

Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature. . . .

See FLA. STAT. ANN. § 232.27 (West 1977).

Effective July 1, 1976, the Florida Legislature amended the law governing corporal punishment. The law now provides:

Subject to law and to the rules of the district school board, each teacher or other member of the staff of any school shall have such authority for the control and discipline of students as may be assigned to him by the principal or his designated representative and shall keep good order in the classroom and in other places in which he is assigned to be in charge of students. If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed:

(1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.

(2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.

(3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other [adult] who was present.

Some sustained fairly severe injuries from the attacks.²⁶¹ Sixteen students testified regarding the severity of discipline.²⁶² Ingraham, an eighth grade student, had been struck twenty times with a paddle²⁶³ because he was slow to respond to instruction.²⁶⁴ He suffered a hematoma requiring medical attention²⁶⁵ and remained out of school for several days.²⁶⁶ The U.S. District Court for the Southern District of Florida found no eighth amendment violation.²⁶⁷ The U.S. Court of Appeals for the Fifth Circuit reversed the district court, ruling that the severity of the corporal punishment inflicted upon Ingraham rose to the level of an eighth amendment violation.²⁶⁸ An *en banc* Court of Appeals, however, later reinstated the district court's ruling, holding that neither severe nor moderate corporal punishment could ever violate the eighth amendment since its protections are simply inapplicable to the public schools.²⁶⁹

After granting *certiorari* in *Ingraham*, the U.S. Supreme Court also rejected the eighth amendment claim, refusing to recognize the applicability of the provision to the public schools.²⁷⁰ As interpreted by the Court, the force of the eighth amendment's prohibition against cruel and unusual punishment had historically come into play only in the context of criminal sanctions.²⁷¹ Moreover, the Court saw no reason to extend the eighth amendment's applicability to the public schools, because it found the public schools to be non-confining (although not wholly voluntarily attended) institutions, lacking physical restraints, and subject to scrutiny by parents and other members of the community.²⁷² Finally, the Court believed that the availability of civil and criminal liability for excessive punishment further reduced the need for the eighth amendment's applicabil-

FLA. STAT. ANN. § 232.27 (West 1977). Corporal punishment is now defined as "the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules." FLA. STAT. ANN. § 228.041(28) (West 1977). The local school boards are expressly authorized to adopt rules governing student conduct and discipline and are directed to make available codes of student conduct. FLA. STAT. ANN. § 230.23(6) (West 1977). Teachers and principals are given immunity from civil and criminal liability for enforcing disciplinary rules, "[e]xcept in the case of excessive force or cruel and unusual punishment. . . ." FLA. STAT. ANN. § 232.275 (West 1977).

261. *Ingraham*, 430 U.S. at 657.

262. *Id.*

263. The paddle used to beat Ingraham was two feet long, three to four inches thick, and one-half inch wide. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 658.

268. *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974).

269. *Ingraham v. Wright*, 525 F.2d 909, 915 (5th Cir. 1976).

270. 430 U.S. 671. The Supreme Court also rejected a procedural due process attack that alleged the need for notice prior to the imposition of corporal punishment. *Ingraham*, 430 U.S. at 672.

271. *Id.* at 664-69.

272. *Id.* at 670-71.

ity.²⁷³ Consequently, the *en banc* decision of the Fifth Circuit was affirmed and Ingraham's eighth amendment claims were dismissed.²⁷⁴

Four justices dissented from the *Ingraham* holding.²⁷⁵ Their dissent, however, was limited to cases involving severe rather than moderate corporal punishment.²⁷⁶ In a footnote, Justice White stated the belief of the dissenters that moderate corporal punishment should not be protected by the eighth amendment, since it could hardly be said to be at odds with evolving standards of decency.²⁷⁷

While the rationale of the majority opinion is not especially compelling, it nonetheless indicates that no matter how barbaric an instance of corporal punishment may be, it cannot be banned in schools on the basis of the eighth amendment to the U.S. Constitution. As the *Ingraham* opinion makes clear, the Supreme Court believes that the eighth amendment is reserved solely for the protection of those involved in the criminal justice system.²⁷⁸

The Supreme Court in the *Ingraham* decision did not condone severe corporal punishment. It merely stated that its prohibition is guaranteed by traditional common law civil and criminal remedies.²⁷⁹ While these remedies have long been available,²⁸⁰ they appear to be totally incapable of protecting children notwithstanding the courts' belief in their efficacy. Once corporal punishment is permitted, abuses are bound to occur.²⁸¹ Since traditional remedies come into effect only after the punishment is inflicted, they cannot adequately prevent abuses in the first instance. Given the number of children corporally punished annually,²⁸² abuses are virtually certain to occur.²⁸³ The absence of a total ban guarantees that such abuses will occur. A ban, however, cannot be based on the eighth amendment. Unless some other part of the U.S. Constitution prohibits corporal punishment, protection can come only from state supreme courts (which thus far have been unwilling to provide protection) or through the legislative or administrative process.

3. Due Process Violations

While *Ingraham* and *Baker* seem to foreclose the notion that corporal punishment is constitutionally prohibited in U.S. schools, some federally guaranteed

273. *Id.* at 670.

274. *Id.* at 683.

275. *Id.* at 683 (White, J., dissenting).

276. *Id.* at 692.

277. *Id.* at 684 n.1.

278. The Supreme Court left open questions regarding the eighth amendment's applicability to juvenile corrections institutions. *Id.* at 669 n.37.

279. *Id.* at 670.

280. See *supra* note 2.

281. It has been estimated that between sixty and seventy-five percent of reported abuse cases arise from parental discipline gone awry. Gil, *Violence Against Children*, 1971 J. MARRIAGE & FAM. 637, 642.

282. See *supra* notes 26-28 and accompanying text.

283. The fact that cases continue to be filed attest to the inadequacy of the remedy.

protection may still exist. *Ingraham* did not resolve whether or not severe corporal punishment could be prohibited as a violation of the right to substantive due process guaranteed by the fifth and fourteenth amendments.²⁸⁴ Although *Ingraham* raised a substantive due process attack in the lower courts,²⁸⁵ the Supreme Court's grant of *certiorari* in that case did not include that issue.²⁸⁶ Thus, the part of the Fifth Circuit's opinion that held corporal punishment to be related to a legitimate state purpose, and neither arbitrary or capricious, was not reached.²⁸⁷

The substantive due process issue was raised again in *Hall v. Tawney*.²⁸⁸ In that case, the plaintiffs alleged, *inter alia*, a violation of substantive due process after a student was paddled in a West Virginia public school.²⁸⁹ The child was alleged to have been beaten with a hard thick rubber paddle.²⁹⁰ As a result, the student allegedly was hospitalized for ten days and treated for spine and back injuries and for soft tissue trauma.²⁹¹ The U.S. District Court for the Southern District of West Virginia dismissed the case, based on *Ingraham*, and the plaintiffs appealed.²⁹²

In reversing the judgment of the district court, the Fourth Circuit Court of Appeals noted that the right to "ultimate bodily security, the most fundamental aspect of personal privacy, is unmistakably established in constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process."²⁹³ For this reason, the forcible use of stomach pumps,²⁹⁴ reckless shootings by police,²⁹⁵ and unprovoked beatings by prison guards,²⁹⁶ have all been held to violate substantive due process. The Supreme Court itself has indicated that personal security and freedom from arbitrarily imposed bodily restraints constitute historic liberty interests protected by substantive due process.²⁹⁷ These opinions suggest that at some level, physical attacks by public officials will not be condoned.

The *Hall* court distinguished moderate from severe punishment. The court reasoned that implicit in *Ingraham* was the belief that moderate corporal punishment was reasonably related to a legitimate state interest in maintaining order

284. See U.S. CONST. amends. V, XIV.

285. *Ingraham*, 498 F.2d at 266.

286. *Ingraham*, 430 U.S. at 659 n.12.

287. *Ingraham*, 525 F.2d at 917.

288. 621 F.2d 607 (4th Cir. 1980).

289. *Id.* at 609.

290. *Id.* at 614. The paddle was approximately five inches wide. *Id.*

291. *Id.*

292. *Id.* at 609.

293. *Id.* at 613.

294. See *Rochin v. California*, 342 U.S. 165, 172 (1952).

295. See *Jenkins v. Averett*, 424 F.2d 1228, 1231 (4th Cir. 1970).

296. See *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973), *cert. denied* 414 U.S. 1033 (1973).

297. See *Youngberg v. Romeo*, 457 U.S. 307, 316 (1981).

in public schools.²⁹⁸ Unlike the Fifth Circuit in *Ingraham*, however, the Fourth Circuit in *Hall* directed its lower courts to inquire whether the force applied during the beating caused injury so severe and disproportionate to its need, or whether the motive for such force was so malicious or sadistic, that it amounted to a "brutal and inhumane abuse of official power literally shocking to the conscience."²⁹⁹ If it does, then the fifth and fourteenth amendment liberty interest in bodily security is violated.³⁰⁰ After the *Hall* opinion was issued, the case was settled, and accordingly no further rulings were rendered.³⁰¹ Thus, at least in the Fourth Circuit, severe corporal punishment is now prohibited as a matter of substantive due process. As stated earlier, however, this guarantee is meaningless in the absence of a complete ban. After-the-fact protections cannot prevent excessive attacks or the resulting injuries from occurring in the first instance. Complete protection will result only if complete statutory bans are enacted.

V. EFFECT OF THE EUROPEAN COURT'S RULINGS IN THE UNITED STATES

The European Court's judgments in *Tyrer* and in *Campbell* may have some effect in the United States. The United States is not a signatory to the European Convention on Human Rights, nor has it ratified the similar American Convention on Human Rights. The United States has, however, undertaken treaty obligations pursuant to the U.N. Charter,³⁰² which makes a nation's treatment of its own citizens an international concern.³⁰³ Unfortunately, the U.N. Charter has been held to be not wholly self-executing,³⁰⁴ and no legislation has been enacted to enforce its provisions.

Nonetheless, the international obligations of a nation do not begin and end with treaty responsibilities. As long ago as 1820, the U.S. Supreme Court recognized the existence of a relationship between U.S. domestic and international law.³⁰⁵ Since that time, the courts have repeatedly said that international law is a part of the domestic law of the United States,³⁰⁶ and must be applied by national courts when questions of international law are presented.³⁰⁷ This concept has never been repudiated by the Supreme Court.³⁰⁸ Indeed, federal courts have

298. *Hall*, 621 F.2d at 611-12.

299. *Id.* at 613.

300. *Id.*

301. Telephone interview with Daniel Hedges, conducted by Margaret Danaher (Nov. 20, 1984).

302. U.N. CHARTER, reprinted in 59 Stat. 1033 (1945).

303. U.N. CHARTER *supra* note 302, arts. 55, 56.

304. See *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir.), cert. denied 382 U.S. 816 (1965).

305. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

306. *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also *infra* notes 308-10 and accompanying text.

307. *Id.*

308. The latest statement by the Supreme Court indicating the concept's continued vitality is demonstrated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

recently applied the doctrine when considering human rights claims based on torture³⁰⁹ and improper detention.³¹⁰

Determining what constitutes international law is seldom an easy task. Domestic courts typically look to the custom and usage of civilized nations,³¹¹ as set forth in the works of jurists and commentators,³¹² to determine whether a rule has become a settled principle of international law.³¹³ If consensus among nations is absent, the rule cannot be considered a part of international law.³¹⁴ Moreover, not all acts generally accepted as wrongs rise to the level of violations of international law.³¹⁵ Thus, to determine the effect of *Tyrer* and *Campbell* on U.S. courts, one must ascertain whether an international consensus has been reached regarding the nature and use of degrading punishments and the scope of parental rights.

In the recent cases of *Fernandez v. Wilkinson*³¹⁶ and *Filartiga v. Pena-Irala*,³¹⁷ U.S. courts have looked to various international human rights instruments to ascertain the international law regarding a nation's treatment of its residents and citizens. In both cases, the courts cited the U.N. Charter, the Universal Declaration of Human Rights, the European Convention on Human Rights, and the American Convention on Human Rights as evidence of the evolving acceptance of human rights protection as a matter of international law. Recognizing the widespread acceptance of those documents, the courts in both *Filartiga* and *Wilkinson* found a general international consensus regarding the protection of certain human rights. They therefore had little difficulty in ruling that both torture³¹⁸ and arbitrary detention³¹⁹ violated international law and were therefore judicially remediable by U.S. courts. Using the approach of the *Filartiga* and *Wilkinson* courts to ascertain the propriety of degrading punishment should result in a finding that it is contrary to international law, since the cited international documents all prohibit it.³²⁰

309. *Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980).

310. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds* 654 F.2d 1382 (10th Cir. 1981) *but cf.* *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 547-48 (D.D.C. 1981).

311. *The Paquete Habana*, 175 U.S. at 700; *United States v. Smith*, 18 U.S. at 160-61; L. OPPENHEIMER, *INTERNATIONAL LAW* 25 (Lauterpacht ed. 1955).

312. *See supra* note 311.

313. *The Paquete Habana*, 175 U.S. at 694.

314. *Sabbatino*, 376 U.S. 398. The validity of expropriation of property does not present justiciable international law claims because consensus regarding economic systems is lacking.

315. *I.T.T. v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975). Theft, for example, while prohibited by all nations, is not a part of the law of nations.

316. 505 F. Supp. 787 (D. Kan. 1980) *aff'd on other grounds* 654 F.2d 1382 (10th Cir. 1981).

317. 630 F.2d 876 (2d Cir. 1980).

318. *Id.* at 884.

319. *Fernandez v. Wilkinson*, 505 F. Supp. at 800.

320. For a more complete discussion of the impact of *Wilkinson* and *Filartiga*, see 4 HOUS. J. INT'L L. 1 (1981) (special issue discussing impact of *Wilkinson* and *Filartiga* decisions upon international human

Difficulties nonetheless arise in determining whether corporal punishment, either of prisoners or of students, is generally regarded as a degrading punishment. Although many Western and non-Western cultures have prohibited physical punishment, other cultures have not.³²¹ No international documents specifically reject corporal punishment short of torture. Even the European Court has not unequivocally rejected the use of corporal punishment in all situations. Rather, its approach in *Tyrer and Campbell* was to conduct a subjective analysis of the specific punishment administered in relation to the specific treaty obligation allegedly violated to determine whether the activity should be prohibited. It is possible that the European Court will rule that corporal punishment violates Article Three of the Convention. If so, that will add support for arguments against corporal punishment. Nonetheless, any decision by the European Court will reflect a European consensus, rather than a general international consensus.

Both European and U.S. courts will have similar difficulties when considering the weight that should be given to parental prerogatives as a matter of international law. While deference to parents in child rearing is internationally recognized, the degree to which parental rights supersede state control in penal or educational matters varies considerably. The European Court has looked to only Western concepts when resolving its cases. Because decisions of the European Court do not necessarily reflect global consensus, they may not be persuasive in the battle to outlaw corporal punishment in the United States. While the United States may be one of the last Western nations not to have completely abandoned the use of physical punishment in schools, it is unlikely that a U.S. court would find that an international consensus of philosophical beliefs regarding parental authority exists in order to form a basis for prohibiting corporal punishment. Litigants' efforts are further reduced as international law may be subjected to a balancing approach similar to that used for constitutional challenges. Thus, state statutory changes may remain the only certain route to eliminate the practice of corporal punishment in the United States.

VI. CONCLUSION

Comparisons between the European Court's treatment of corporal punishment in schools and that of U.S. courts indicate obvious differences. The U.S. courts and most state legislatures clearly permit moderate corporal punishment in schools, but prohibit severe corporal punishment by virtue of civil and criminal penalties and perhaps even constitutional guarantees. The U.S. approach

rights law). See also Christianson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3 (1983); Paust, *Book Review Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. REV. 227 (1981).

321. Nations governed by Islamic law, for example, still permit physical punishment for some crimes.

can be explained, in large measure, by the absence of a societal consensus in the United States regarding the evils of corporal punishment, and by the traditional balancing of constitutional rights against perceived governmental needs.

In Britain, legislation will shortly permit moderate corporal punishment, but only with parental concurrence. Severe corporal punishment remains prohibited by virtue of traditional civil and criminal penalties as remedies for excessive attacks.³²² While the European Court has never directly ruled on the issue,³²³ the rationale used in the *Tyrer* case could be used in school cases to prohibit the punishment entirely. A case involving the application of Article Three to corporal punishment was filed, but subsequently settled, when the United Kingdom circulated to local school districts a European Human Rights Commission Report that warned that corporal punishment in schools could in some circumstances violate Article Three.³²⁴ Nonetheless, another pending case may provide the vehicle for the total abolition of corporal punishment in the United Kingdom.

No matter how the European Court finally resolves this issue, the continued vitality of corporal punishment in the United States seems assured for some time. Notwithstanding the repeated abuse of children, U.S. courts and legislators seem unwilling to ban the punishment in schools. While the European Court opinions may encourage new avenues for attack, the only certain way to protect children in U.S. schools from the dangers of corporal punishment is through legislative change, which has not yet occurred with any degree of intensity.

322. See *infra* note 324 and accompanying text.

323. See *infra* note 324 and accompanying text.

324. See *Y v. United Kingdom*, 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 402, 405 (referring to circular of April 8, 1981).